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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1916.

No. **629** 250

CHICAGO AND NORTH WESTERN RAILWAY CO.,
Petitioner,
vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR PETITIONER.

WILLIAM G. WHEELER,
CHARLES A. VILAS,
Counsel for Petitioner.

(25,459)



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Writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment of that court, affirming a judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division (Honorable Kenesaw M. Landis, Judge) for one hundred dollars penalty, in an action by the United States under the "28-Hour Law" Act of June 29, 1906, Chapter 3594, 34 U. S. Statutes at Large, 607.

STATEMENT OF THE CASE.

The declaration in this case sought to recover a penalty of Five Hundred (\$500.00) Dollars from the defendant

(plaintiff in error) for confining on the fourth, fifth and sixth days of October, 1913, a carload of hogs for more than thirty-six consecutive hours, to wit, thirty-nine hours and five minutes, without unloading.

The defendant pleaded the general issue and the case was tried in the District Court on the 6th and 7th days of November, 1914, before a jury which rendered a verdict of guilty. Thereafter, after motion for new trial had been denied and on the 30th day of June, 1915, judgment was entered by the said District Court against the defendant for One Hundred (\$100.00) Dollars and costs.

A writ of error to review this judgment was taken to the Circuit Court of Appeals for the Seventh Circuit and an opinion and decision affirming the judgment of the District Court was rendered April 18th, 1916, reported 238 Fed. Rep., 234. To review that judgment this writ of certiorari has been allowed.

At the opening of the trial it was announced that seven other cases arising upon the same Statement of Fact are pending in the District Court and it was agreed that the same judgment shall be entered in each of those seven as is finally entered in this case. In other words in trying this case, eight cases are disposed of. (Trans., 6.)

It was admitted by the defendant that the stock in question was loaded at six o'clock in the evening of October 4th, 1913, and unloaded at 9:05 A. M. on October 6th, 1913, thirty-nine hours and five minutes after the time it was loaded. (Trans., 6.) Upon this admission and upon the waybill, "wide-awake" report and thirty-six hour extension request, which are brought into this court as separate exhibits, the Government rested its case.

The defense of the Railway Company was that delivery within thirty-six (36) hours was prevented by

“accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight.” (34 U. S. Stat., 607.)

The unavoidable causes relied upon were, (1) the pulling out of a drawbar when the train was almost in Chicago, causing the derailment of a car and the delay of the train for about three hours; (2) the bursting of an air hose at a subsequent period about two miles from the Union Stock Yards, causing another drawbar to be pulled out and a further delay of twenty-eight minutes. The testimony offered by the defendant as to the facts relative to these accidents, is wholly uncontradicted and we shall therefore attempt, with appropriate references to the transcript, to compile a narrative of the movement of the cars involved, without attempting to state in detail the testimony of each witness as it was given.

The car involved in the suit was C. & N. W. live stock car No. 4999 and was shipped from Ringsted, Iowa, to the Union Stock Yards, Chicago. Ringsted, Iowa, is about four hundred and thirty-eight miles from Chicago and is three hundred miles from Clinton, Iowa, which latter point is one hundred and thirty-eight miles from Chicago. (Trans., 29.) The record is silent as to the history of the movement of this car from Ringsted to Clinton. It was loaded at Ringsted on October 4th, 1913, at six P. M. and it left Clinton, Iowa, on October 5th at six P. M., having then been on the road twenty-four hours and having traveled three hundred miles of the distance to Chicago. (Trans., 28 and 7.) At the latter time it was the forty-sixth car in the train. (Trans., 28.) The usual running time from Clinton to Chicago for trains of this kind is nine hours, but it has been done in six hours. (Trans., 8.) This train therefore, leaving

Clinton at six P. M., had twelve hours, or until six A. M. of the day following in which to make its run and deliver the stock within the thirty-six hours limit.

At Nelson, Illinois, ninety-one miles from Chicago, at about eight-thirty P. M. this train picked up four or five additional cars of stock, among them car No. 21239, which was about the fifth car from the locomotive. (Trans., 7 and 28.) It was this car which subsequently caused the accident at Proviso, Illinois.

At 2:48 A. M., while this train was passing through Proviso, a point about 16 miles from the Union Stock Yards (and with slightly over three hours still left of the thirty-six in which to finish the run), a drawbar came out of the rear end of car No. 21239, fell upon the track and derailed the car following. (Trans., 8.) The train at that time was moving in the usual way and there was no unusual jolt or movement or any improper working of the engine or improper application of the air, or anything else to cause unusual strain. (Trans., 8.)

For the reason that the front trucks of the derailed car were at a considerable angle to the tracks and blocked both main tracks, it was impossible to rerail this car without the aid of a steam wrecker. The steam wrecker at that time was at Palatine, Illinois, about forty miles distant. It was sent for by telegraph, left promptly upon receipt of orders and arrived at the scene of the wreck at 5:05 A. M. The car was rerailed by the steam wrecker and the train proceeded again at 5:40 A. M. It would have taken much longer to have rerailed the car by means of jacks and there would have been danger of tipping the car over with its heavy load of live stock. (Trans., 16.) The wrecking foreman was unable to assign a cause for the pulling out of the drawbar. There are many cases where the reason cannot be determined by inspection of

the drawbar after the accident. There are very frequent cases when it is impossible to give the reason for the break. (Trans., 16.)

After the train had proceeded as far as Brighton Park, about a mile and a half from the Union Stock Yards, a further delay of twenty-eight minutes was caused by reason of an air hose bursting on the 22nd car ahead of the way-car, M. & St. L. car No. 34263, the 29th car in the train. This resulted in throwing on the air brakes in emergency and creating an unusual strain at the rear part of the train. As the result of this another drawbar was pulled out near the head end of the train. (Trans., 17.) The bursting of an air hose is something that cannot be anticipated or prevented and there are no precautionary measures to be taken to prevent such an accident. No one can tell from inspection when an air hose is going to burst. (Trans., 18.) The accident taking place near the rear end of the train caused the air to set at the rear end first and created a heavy strain upon the front end of the train from the locomotive. This heavy strain may reasonably be expected to cause a drawbar to come out. (Trans., 18.)

INSPECTION.

In addition to proving the accidents above described the defendant also proved thorough and careful inspection of the train in two methods; first, by regular inspectors at Clinton, Iowa; second, by the train crew, en route.

The inspection at Clinton, Iowa, was proved by Mr. Thomas Donahoe, Chief Inspector ((Trans., 20, 22, 27) and two assistants, J. G. O'Brien (Trans., 21 and 27) and M. H. McCune (Trans., 26).

Car No. 21239 (the one which caused the first accident) came into Clinton in the afternoon of October 5, on train

No. 114. (Trans., 24.) This train was inspected in the usual way and the record of the inspection was introduced in evidence.

The record consists of three books which were too bulky to attach to the record and are in this court in the custody of the marshal as separate exhibits. The method of inspection applied to this train was for two inspectors to examine the train, one on each side; examination of all the running gear was made, including the drawbars. If any defects were found they were either repaired or the car was tagged as bad order and set out for repair, and a note thereof made by the inspectors, which note was ultimately transcribed into the books which are in evidence.

The books show that the train was inspected and that a new brass was put into the caboose of the train, but contained no other entry of any defects in that train. If there had been any they would have been noted in the books. The inspection if made after dark was made with the aid of lanterns with reflectors and was such as would have disclosed any defects in the draft rigging. (Trans., 20.)

Car No. 21239, after arriving in Clinton on train No. 114 and being inspected, left Clinton and proceeded as far as Nelson, Illinois, at which point it, with some other cars, was set out, the reason appearing to be that the train was a heavy train and was not making the required time. (Trans., 24.) These cars, so set out, were later picked up by the train containing car No. 4999 (the car involved in this suit) and were by that train carried into Chicago.

The conductor of the latter train inspected the car in question at Nelson, Illinois, and the train was regularly inspected by its crew at all stops made for coal and

water. (Trans., 10.) The usual method of inspection by the train crew is either to walk along the train while coal and water are being taken and examine the riggings of the cars with a lantern, or to stand while the train is slowly pulling by them and examine them in the same way. This examination is the usual method and is sufficient to discover any defects which may exist either in the brakes, running gear or draft gear. The conductor of this train testified (Trans., 8 and 9):

“You can examine all draft rigging and brake rigging that is running with the cars sufficiently to see if anything is out of place. * * * As an experienced railroad man I think I could make an examination of the draft mechanisms on each one of these cars sufficiently to be of value.”

The conductor who took car 21239 out of Clinton, also inspected the train between Clinton and Nelson before setting out the cars. He did this himself by walking clear around the train on both sides and looking over all the coupling apparatus and did not discover anything wrong with any of the cars. (Trans., 24.)

We have not attempted to set forth in detail the testimony of each member of the various train crews concerned in the movement of this car but with one exception every trainman concerned in the movement of the car in any train between Clinton and Chicago was called to the stand and testified as to his part in the inspection of the train. The only exception was the head brakeman of the train involved in the suit who is out of the service of the company and could not be found. (Trans., 10.)

Furthermore, the engineer of each train which handled this car between Clinton and Chicago, was called to the stand and testified that the train was handled carefully, that it was started slowly after taking up the slack and was not jerked or jarred in any way which would tend to weaken the draft rigging of the cars. (See testimony

of H. H. Wilson, Trans., 11, and A. C. Johnston, Trans., 25.)

Summarizing the foregoing, the following facts are established by the undisputed evidence:

1. The car in question left Ringsted, Iowa, at 6 P. M., October 4, 1913, with thirty-six hour release.
2. It left Clinton, Iowa, at 6 P. M., October 5, with twelve hours of the thirty-six still left.
3. The usual running time from Clinton to Chicago is nine hours and it has been done in six.
4. The car was within 16 miles of destination at 2:48 A. M. when the accident occurred.
5. The car which caused the accident at Proviso was inspected by two inspectors at Clinton, Iowa, before it left there and at least three times en route between Clinton and Chicago, and no defects were found.
6. There were no unusual delays between Clinton and Proviso.
7. The shipment was delayed two hours and fifty-two minutes at Proviso by the pulling of this drawbar, an accidental and unavoidable cause which could not have been anticipated or avoided by the exercise of due diligence and foresight.
8. Such accidents occasionally happen in the operation of a railroad and cannot be assigned to any definite cause.
9. A further delay of twenty-eight (28) minutes was caused at Brighton Park by the bursting of an air hose and the consequent pulling of another drawbar.
10. This accident could not be foreseen or guarded against.
11. These trains were at all time properly handled by the engineers in charge of them.

12. The delays above described were the cause of the excessive confinement of the cattle.

ERRORS RELIED UPON.

1. The court refused to direct a verdict for defendant at the close of all the testimony. (Trans., 29.)
2. The court erred in overruling motion for new trial. (Trans., 31.)
3. The court erred in fining the defendant and entering judgment upon the verdict for \$100.00 and costs.
4. The court erred in giving to the jury the following instructions:

“The language of this statute providing for the limitation, and including the clause which provides the excuse for confinement in the case of confinement beyond the time fixed by the limitation says, in substance, that the carrier shall be excused when it is prevented from complying with the statute by storm or accidental and unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight. So, it presents to you the question for determination on this fact: Whether or not this car of stock by the exercise of due diligence by this railway company, the carrier, could have been transported from its point of origin out in Iowa, to destination, Union Stock Yards, within thirty-six hours. This inquiry is not merely whether or not, at Proviso, the thing was done which good railroading would require to be done to get this car, which the evidence shows was wrecked, back on the track and in condition to permit the movement; this inquiry is not merely whether or not, where this air hose broke, at Brighton Park, the railroad company did what a railroad company ought to do,—what good railroading requires to be done to reduce delay and provide movement at Brighton Park. Your inquiry has to do with the transportation of this car of stock from the point of origin out in Iowa to destination, Union Stock Yards, and if, on the evidence in this case, you conclude that the Railway Company,

by the exercise of due diligence, would have gotten and could have gotten that car of stock from the point of origin to Union Stock Yards inside of thirty-six hours, your verdict should be in favor of the United States and against the defendant, even though you should be of the opinion that these two particular things which have been made the subject of most of the contention here were properly handled by the Railway Company. (Trans., 29.)

5. The court erred in giving to the jury the following instruction:

"Now, in determining this question you take into consideration the distance, among other things, the distance shown by the evidence from the point of origin to destination, what the evidence shows as to the period of time, thirty-nine hours and five minutes consumed from point of origin to destination, not merely from Clinton to Chicago, the whole movement is here for your consideration and to be considered by you in determining whether or not due diligence has been shown by the carrier." (Trans., 30.)

6. The court erred in giving to the jury the following instruction:

"Now what is due diligence? Due diligence, as that term is used in this statute means the exercise of foresight bringing to bear on the situation in hand, the transaction in hand, the human intelligence of an average man employed in such business and exercised by a man who has been experienced in railroad business, trained in railroad business so that he knows what should be done in the matter of handling railroads, operating railroads, moving cars,—not merely the movement of an engine, the handling of the throttle by an engineer, not merely the handling of the conductor's work, the brakeman's work, or the division superintendent's work, but the whole thing involved in the transaction or operation of the railroad in so far as the movement of this train is concerned, and whatever ingenuity, that is to say, whatever human intelligence could devise and put in operation, having in mind the practical operation of a railroad, and having in mind the purpose which the law has, to get stock to

market within the time mentioned, having in mind the movement of trains, the keeping of a railroad open, what human ingenuity could devise, in so far as human intelligence goes, having the benefit of experience, in the way of safeguards and in the way of provision to get stock from origin to destination within the period of this statutory limit, the railroad company has to do. Of course, it is not the law that a railway company may lay out a slow schedule over a long distance and then if just before they get in to destination something happens for which they were not prepared or equipped, merely because if that thing had not happened they might have skinned in within the thirty-six hour limit they are excused; that is not the law." (Trans., 30.)

7. The court erred in giving to the jury the following instruction:

"But that is not the limit of your inquiry. You may consider the evidence in this case as to the movement of this stock from origin to destination, considering the entire time taken up at various places where the evidence shows there were stops, and you are authorized to find under the evidence whether if you please, it measures up to the standard of due diligence exercised by this defendant in accomplishing the thing with a view to obeying the law. You are authorized to find that the delay is excused by these two accidents. If you find on the evidence in this case that the accidents happened, and that the lost time they occasioned is as testified by the defendant's witnesses, that, as everything else in this matter in the way of evidence is for your ultimate determination." (Trans., 31.)

BRIEF OF ARGUMENT.

I.

The trial court should have directed a verdict because it was established by the undisputed evidence that the unloading of the cattle in car No. 4999 within the time prescribed by the law, was prevented by accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight.

C. B. & Q. Railroad Co. v. United States, 194 Fed., 342.

United States v. Kansas City Southern Railway Company, 189 Fed., 471.

United States v. Atchison, Topeka & Santa Fe Railway Company, 166 Fed., 160.

United States v. Boston & Maine Railroad Co., 228 Fed., 915.

II.

The penalty can be imposed only for such violations of a statute as are shown to be "knowing and willful."

U. S. v. Atchison, Topeka & Santa Fe Ry. Co., 166 Fed., 160.

U. S. v. Union Pacific R. R. Co., 169 Fed., 65.

St. L. & S. F. R. R. Co. v. U. S., 169 Fed., 69.

C. B. & Q. R. Co. v. U. S., 194 Fed., 342.

U. S. v. Union Stock Yards Term. Ry. Company, 178 Fed., 19.

St. Joseph Stock Yards Company v. U. S., 187 Fed., 104.

U. S. v. Lehigh Valley Ry. Co., 204 Fed., 705.

- Oregon & Washington R. R. & Navigation Co.*
v. *U. S.*, 205 Fed., 341.
St. L. M. B. T. R. R. Co. v. U. S., 209 Fed., 600.
U. S. v. Philadelphia & Reading Ry. Co., 223
Fed., 211.
U. S. v. Philadelphia & Reading Ry. Co., 223
Fed., 207.
M. K. & T. R. Co. v. U. S., 178 Fed., 15.

III.

The only question for the jury under the evidence was whether unloading within the time prescribed was prevented by "accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight"; and the charge of the court, submitting to the jury the question as to whether the defendant, aside from the accidents proved, exercised due diligence and foresight in laying out its schedule and getting the cattle to destination, and in permitting the jury to consider the entire journey from point of origin to destination, was therefore erroneous. (Trans., 30 and 31.)

Chicago, Burlington & Quincy Railroad Co. v. United States, 194 Fed., 342.

ARGUMENT.

The foregoing specifications of error give rise to two main points, first, the court should have directed a verdict for defendant on the ground that a complete defense had been made; second, the court erred in his charge to the jury.

I.

The statute is set forth in full at the end of this brief and it will be seen that the first section thereof positively forbids confinement of cattle in cars for longer than twenty-eight (28) hours without unloading, feeding and resting, except that upon written request from the owner, the time may be extended to thirty-six (36) hours; the thing prohibited is the continuous confinement of cattle in cars longer than the period specified. Proof therefore of such excessive continuous confinement shows a violation of the provisions of Section 1.

There is, however, an exception embodied in Section 1 in the following language:

“Unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight.”

The defendant in this case undertook to show that unloading was prevented by accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence or foresight. The evidence which it submitted to establish its defense was not contradicted in any particular by any witness. If, therefore, it showed so clearly as to leave no ground for reasonable minds to differ, that the unloading was so prevented, it was the duty of the trial court to direct a ver-

diet of not guilty. Before proceeding to discuss the evidence in detail, however, let us first consider Section 3 of the Act.

The second section of the Act relates to the feeding of the animals after their unloading and is not material here.

Section 3 provides, in effect, that any railroad company "who knowingly and willfully fails to comply with the provisions of the two preceding sections" shall be liable for a penalty. Here we have a further limitation upon Section 1. The failure to do that which is prohibited by Section 1 gives rise to a cause of action in a civil suit for penalty, only if the failure is knowing and willful. The word "knowingly" presents little difficulty of definition. The word "willfully" has been defined as meaning "purposely or obstinately, and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute, or is plainly indifferent to its requirements."

St. Louis & Santa Fe Railway Co. v. United States, 169 Fed., 69.

Chicago, Burlington & Quincy R. R. Co. v. United States, 194 Fed., 342.

The Circuit Court of Appeals for the Seventh Circuit has approved this definition.

St. Louis & S. F. Railway Co. v. United States, 169 Fed., 69.

The plaintiff in error claims in this case that the evidence shows conclusively that the unloading enjoined by Section 1 of the Act was prevented by an accidental or unavoidable cause which could not be anticipated or avoided by the exercise of due diligence and foresight, and, further, that the confinement in excess of the time

prescribed was neither knowing nor willful. The uncontradicted evidence shows that the train conveying the cars involved in this suit, left Clinton, Iowa, one hundred thirty-eight miles distant from Chicago with twelve full hours in which to make a run which ordinarily consumed but nine and had been made in six hours; that during the journey from Clinton to Proviso the cars composing the train had been carefully inspected by competent men and that no discoverable defects had been noted; that the train arrived at a point but 16 miles from its final destination with three hours and twelve minutes of the lawful time still left; that notwithstanding the careful inspection by trained inspectors at Clinton, Iowa, and by the train crew frequently upon the way in, a drawbar pulled out and caused an accident which occasioned a delay of two hours and fifty-two minutes; that a further delay of twenty-eight minutes, making a delay in all of three hours and twenty minutes took place at Brighton Park from causes which were equally unforeseeable; and that these unforeseeable accidents were the proximate and controlling causes which prevented the unloading of the cattle within the time. Taking all intendments against the railroad company and assuming that it would have taken as long at three o'clock in the morning to traverse the Chicago terminals as it did three hours later, the cattle would have arrived and been unloaded fifteen minutes before the expiration of the thirty-six hours, if it had not been for these two unavoidable accidents. The record therefore distinctly shows that the unloading was prevented by accidental or unavoidable causes as provided in the first section of the statute, and there was nothing for the trial judge to do therefore, but to direct the verdict for the defendant. He was not concerned with the question of negligence or with the question of the care which the defendant exercised in the early part

of the run, or in laying out its schedule, for the defendant is not required to lay out its schedule with reference to accidents which it cannot foresee or avoid in the exercise of due diligence and foresight. The railroad company was authorized to operate its trains with reference to its daily custom and so long as the cattle were unloaded within the thirty-six (36) hour period, be it only one minute prior to the expiration thereof, the defendant was within the law.

II.

The record shows with clearness that the failure to comply with the requirements of Section 1 was neither knowing nor willful. So far as the diligence of the defendant's employees could ascertain, everything about the trains involved was in proper running order and free from defect. Frequent and careful inspections were made, and great care seems to have attended the making of these inspections. There is no opportunity to claim from the evidence that the accidents which have been shown to have been the cause of the delay, were willfully brought about, or that the delay occasioned thereby was purposely or obstinately occasioned by the defendant, or that the attitude of the defendant in this case was that of a carrier "who having a free will or choice, either intentionally disregards the statute, or is plainly indifferent to its requirements." Quite the contrary attitude on the part of this carrier is shown by the evidence. There is no claim of an intentional disregard of the statute, or a deliberate one, and certainly no indifference to the plain requirement of the law can be deduced from the testimony in this case. Giving the testimony the construction least favorable to the railroad company warrants a finding that the failure to comply with Section 1 of the Act was neither knowing nor willful.

The Circuit Court of Appeals for the Eighth Circuit has passed upon a case very similar to this one. (*Chicago, Burlington & Quincy Railroad Company v. United States*, 194 Fed. Rep., 342.) In that case during a run usually requiring eleven hours a delay of over two hours was caused by a series of accidents consisting of broken drawbars and knuckles of one of the automatic couplers in the train slipping by and causing the train to break in two. In commenting upon this situation, the Circuit Court of Appeals said:

“There is no evidence that any of these delays were caused by the negligence of the company, or of its servants. There is undisputed testimony that the sheep train and its drawbars were inspected at Alliance, and that they were in good condition, that drawbars sometimes pull out and knuckles in automatic couplers sometimes slip by, that it is impossible to prevent such occasional accidents, and that the train dispatcher could not, from his practical experience, undertake to calculate when a train would be delayed by reason of the pulling out of drawbars. Such an unusual series of accidents, the pulling out of three drawbars, the breaking of a chain, and the slipping of a knuckle, causing three successive delays, is not the natural and probable effect of running a freight train eleven hours, and hence it is not conclusive proof of a lack of due diligence and foresight for the operators of trains to fail to anticipate it and to run the train on the theory that it will not occur.”

The conclusion reached by the court was that:

“The preponderance of the evidence in this case was that the railroad company was prevented from unloading these sheep within the thirty-six hours by accidental causes which could not be anticipated or avoided by that due diligence and foresight which reasonably prudent and careful men ordinarily exercise in like circumstances, and that there was not only no conclusive, but no substantial evidence that it knowingly and willfully failed to comply with the law.”

The judgment of the court below in favor of the Government was reversed and the case remanded for a new trial.

The Circuit Court of Appeals for the Seventh Circuit in the case at bar reached a conclusion opposite to that just quoted. Referring to the exception in the first section of the Act, the court said:

"If the unloading is so prevented, the delay is excused; but if notwithstanding unanticipated and unavoidable delays the carrier ought nevertheless in the exercise of reasonable diligence to have unloaded the stock within the prescribed time, the delay will not relieve it from liability for confinement beyond that time. Delay in transportation may or may not necessarily delay the time of unloading, depending upon the facts of each case." (Trans., 47.)

And further on they say:

"If conceding three hours twenty minutes of excusable delay at Proviso and Brighton Park, the jury nevertheless found from the evidence that the confinement of the stock in question ought not, in the exercise of due diligence by the carrier, to have exceeded the thirty-six hours, or if exceeding thirty-six, ought not to have been as long as thirty-nine hours five minutes, its verdict would in that regard be justified." (234 Fed., 270.)

What the court said in the quotation first above made was in effect that if the unloading is prevented by accidental or unavoidable causes which could not be foreseen in the exercise of due diligence and foresight, the delay was excused, but that if the proximate cause of the delay was not the unavoidable accident, but some other neglect on the part of the carrier, it was not excused. The issue in this case was not whether the carrier was negligent in its train schedules or in its care for the shipment other than in respect to the accidents referred to. The sole issue toward which the evidence was directed was whether or not the accidents which have been described,

prevented unloading within the time limit, and were unforeseeable in the exercise of due diligence and foresight. That these accidents were the cause of the failure to unload within the time limit, there can be no doubt. The Circuit Court of Appeals, however, would have the carrier prove to the satisfaction of the jury that its conduct of this shipment throughout was not negligent. We do not understand that kind of proof of want of negligence would exonerate the carrier from the duty of unloading the cattle within thirty-six (36) hours.

There was but one issue in the case, viz.: was the unloading prevented by one of the causes specified in the first section of the Act. The Circuit Court of Appeals recognizes that if it was, the delay was excused, but approves of an instruction of the trial court on the question of diligence which permitted the jury to find the defendant guilty upon an immaterial issue.

The Circuit Court of Appeals, while recognizing in its opinion that the words "knowingly and willfully" are in the statute, in effect ignores their presence there in the statement of the case. As we have already stated, it is not every violation of Section 1 that gives rise to an action for the penalties under Section 3, but only such violations as are *knowingly and willfully* committed.

As the Circuit Court of Appeals for the Eighth Circuit said:

"The qualifying words cannot be disregarded. They mean something, and whatever that may be is an essential element of every right to the penalty." (*St. Louis & Santa Fe Railway Company v. United States*, 169 Fed., 69-71.)

The Circuit Court of Appeals for the Seventh Circuit has itself recognized that there must be some evidence of knowledge and willfulness on the part of the carrier before recovery can be had. In the case of *St. Louis*

Merchants Bridge Terminal Railway Company v. United States, 209 Fed., 600, that court adopts the definition of "willfully" given by the Circuit Court of Appeals for the Eighth Circuit as meaning "purposely or obstinately, and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute, or is plainly indifferent to its requirements," and the court in the case just cited says, page 602:

"We have searched this record in vain for any facts tending to show that plaintiff in error, knowingly and willfully violated the statute."

The words therefore cannot be disregarded in this case, and even conceding that there was evidence of a knowing violation of the provisions of Section 1, the evidence falls far short of disclosing any intention, or any flagrant disregard of the provisions of the law on the part of the railroad company which can be properly termed *willful*.

The case of *Chicago, Burlington & Quincy Railroad Company v. United States*, 194 Fed., 342, was cited and followed by the District Court of Massachusetts in the case of *United States v. Boston & Maine Railroad Company*, 228 Fed., 915. The overtime in that case was about seven hours and was caused by the engine developing a hot box, which required its being replaced by a second engine. This engine developed trouble in the boiler which also delayed it, although it had worked well on its previous trip.

In finding in favor of the defendant, the judge said:

"No reason is suggested why the defendant should have foreseen that the first engine was likely to develop a hot box which would necessitate withdrawing it *en route*, still less why it should anticipate that the second engine, which had worked well on its previous run, should suddenly develop a leaky

boiler. As I understand the facts, it was the failure of both of these engines, and not of one of them alone, which delayed the train so that delivery was impossible within the time limit.

I therefore find that the defendant was prevented by accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight, from unloading the shipment of sheep in question."

III.

THE INSTRUCTIONS.

The court in his instructions to the jury used the following language:

"The language of this statute providing for the limitation, and including the clause which provides the excuse for confinement in the case of confinement beyond the time fixed by the limitation says, in substance, that the carrier shall be excused when it is prevented from complying with the statute by storm or accidental and unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight. So, it presents to you the question for determination on this fact: Whether or not this car of stock by the exercise of due diligence by this railway company, the carrier, could have been transported from its point of origin out in Iowa, to destination, Union Stock Yards, within thirty-six hours. This inquiry is not merely whether or not, at Proviso, the thing was done which good railroading would require to be done to get this car, which the evidence shows was wrecked, back on the track and in condition to permit the movement; this inquiry is not merely whether or not, where this air hose broke, at Brighton Park, the railroad company did what a railroad company ought to do,—what good railroading requires to be done to reduce delay and provide movement at Brighton Park. Your inquiry has to do with the transportation of this car of stock from the point of origin out in Iowa to destination, Union Stock Yards, and if, on the evidence

in this case, you conclude that the railway company, by the exercise of due diligence, would have gotten and could have gotten that car of stock from the point of origin to Union Stock Yards inside of thirty-six hours, your verdict should be in favor of the United States and against the defendant, even though you should be of the opinion that these two particular things which have been made the subject of most of the contention here were properly handled by the railway company."

"Now, in determining this question you take into consideration the distance, among other things, the distance shown by the evidence from the point of origin to destination, what the evidence shows as to the period of time, thirty-nine hours and five minutes consumed from point of origin to destination, not merely from Clinton to Chicago, the whole movement is here for your consideration and to be considered by you in determining whether or not due diligence has been shown by the carrier."

"Now what is due diligence? Due diligence, as that term is used in this statute means the exercise of foresight bringing to bear on the situation in hand, the transaction in hand, the human intelligence of an average man employed in such business and exercised by a man who has been experienced in railroad business, trained in railroad business so that he knows what should be done in the matter of handling railroads, operating railroads, moving cars,—not merely the movement of an engine, the handling of the throttle by an engineer, not merely the handling of the conductor's work, the brakeman's work, or the division superintendent's work, but the whole thing involved in the transaction or operation of the railroad in so far as the movement of this train is concerned, and whatever ingenuity, that is to say, whatever human intelligence could devise and put in operation, having in mind the practical operation of a railroad, and having in mind the purpose which the law has, to get stock to market within the time mentioned, having in mind the movement of trains, the keeping of a railroad open, what human ingenuity could devise, in so far as human intelligence goes, having the benefit of experience, in the way of safeguards and in the way of provision to get stock

from origin to destination within the period of this statutory limit, the railroad company has to do. Of course, it is not the law that a railway company may lay out a slow schedule over a long distance and then if just before they get in to destination something happens for which they were not prepared or equipped, merely because if that thing had not happened they might have skinned in within the thirty-six hour limit they are excused; that is not the law."

"But that is not the limit of your inquiry. You may consider the evidence in this case as to the movement of this stock from origin to destination, considering the entire time taken up at various places where the evidence shows there were stops, and you are authorized to find under the evidence whether if you please, it measures up to the standard of due diligence exercised by this defendant in accomplishing the thing with a view to obeying this law. You are authorized to find that the delay is excused by these two accidents. If you find on the evidence in this case that the accidents happened, and that the lost time they occasioned is as testified by the defendant's witnesses, that, as everything else in this matter in the way of evidence is for your ultimate determination."

The court by the instructions above quoted brought a new issue into the case and the only issue upon which the case could go to the jury. If the court is incorrect in these instructions in the particular hereinafter referred to, a verdict should have been directed for the defendant. The instruction practically amounts to this, that if the jury concluded that the railway company by the exercise of diligence could or would have transported the car from point of origin to destination inside of thirty-six hours, notwithstanding the delays to which the evidence was directed, they should find for the Government, even though the jury might be of the opinion that the delays explained by the evidence were properly handled by the railway company. In other words, that it was incumbent upon the railway to trace that shipment

from point of origin to destination and show that it moved promptly and without any delays, except such as are excusable under the law. The law does not place any such obligation upon the railroad company. It recognizes the fact that railroad companies have to make many stops to their trains. Frequently a freight train must be held on a siding to permit a passenger train to pass. It may be necessarily delayed for a variety of causes, none of which would be excusable under the law, but which could not reasonably be avoided in railroad operation. The law says, in effect, simply this, that the railroad company may arrange its own schedule, may operate its trains as it pleases, but that it must not confine stock on its cars in any case for a longer period than thirty-six hours. This has nothing to do with train movements. It has to do with the confinement of the stock. This makes it necessary, of course, that the railroad company should establish schedules which will either permit the stock to reach destination within the time limit for confinement, or permit their unloading into yards or pens where the stock may be rested, fed and watered for the requisite time. Having done this, the railway company may move its trains as it pleases. It must be apparent that this is the case, for otherwise a stock train could move only without delay, for a delay other than that excusable by the language of the act would be no defense to an action. The court's instruction would be more properly applicable to a case where damages were sought by the shipper by reason of delay than to the instant case. The instruction of the trial court would make defense of these cases impossible, and the language of the act "unless prevented by accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight" become meaningless. If the court was wrong in this in-

struction, then, as above stated, the carrier has in this case completely exonerated itself from blame, for, applying the proper rule, it appears that the accident could not reasonably have been anticipated by the exercise of diligence and foresight; that the confinement was not wilful.

What has been said about the charge of the trial court applies with equal force to the decision of the Circuit Court of Appeals, for that court expressly approved of the giving of the instructions.

It is therefore submitted that the judgments of the Circuit Court of Appeals and of the District Court should be reversed.

Respectfully submitted,

WILLIAM G. WHEELER,

CHARLES A. VILAS,

Counsel for Petitioner.

APPENDIX.

“An Act to prevent cruelty to animals while in transit by railroad or other means of transportation from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, and repealing sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the United States Revised Statutes.

Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight: *Provided,* That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time dur-

ing which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this Act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: *Provided*, That it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

SEC. 2. That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with Section one of this Act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires.

SEC. 3. That any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars: *Provided*, That when animals are carried in cars, boats, or other vessels in which they can and do have proper food,

water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply.

SEC. 4. That the penalty created by the preceding section shall be recovered by civil action in the name of the United States in the circuit or district court holden within the district where the violation may have been committed or the person or corporation resides or carries on business; and it shall be the duty of United States attorneys to prosecute all violations of this Act reported by the Secretary of Agriculture, or which come to their notice or knowledge by other means.

SEC. 5. That Sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the Revised Statutes of the United States be, and the same are hereby, repealed.

Approved, June 29, 1906."



In the Supreme Court of the United States.

OCTOBER TERM, 1917.

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| CHICAGO & NORTH WESTERN RAILWAY COMPANY, PETITIONER, v. THE UNITED STATES. | } | No. 250. |
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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The Circuit Court of Appeals for the Seventh Circuit affirmed a judgment for a penalty of \$100 for an alleged violation of what is known as the Twenty-eight Hour Law of June 29, 1906. (34 Stat., ch. 3594, p. 607; 234 Fed. 268.)

The statute forbids the confining in cars of cattle or other animals in interstate shipments for a longer period than 28 consecutive hours and requires the carrier, within that period, to unload them for rest and feeding, "*unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight,*" and except that the time of confinement

may, upon written request of the shipper, be extended to 36 hours. A carrier "knowingly and willfully" failing to comply is subject to a penalty.

This case. Here, cattle were carried in a special cattle train, without unloading, from Ringsted, Iowa, to the Union Stock Yards at Chicago, a distance of 438 miles. There was a proper 36 hours' request, but the cattle were confined 39 hours and 5 minutes.

The defense. There was no storm, and the defense was predicated alone on an effort to show that unloading within 36 hours was prevented by "accidental or unavoidable causes" which could not have been "anticipated or avoided by the exercise of due diligence and foresight." The contention is that there were two accidents which, together, caused delays amounting to 3 hours and 20 minutes, and but for which, it is said, the cattle would have been unloaded with 15 minutes to spare.

The Government's contention is (1) that the evidence fails to show 3 hours and 20 minutes' unavoidable delay, and (2) that if this had been shown there is ample evidence to justify a verdict that, notwithstanding this delay, with due diligence on the part of the carrier, the cattle could have reached their destination within the time prescribed by law.

The evidence. The train proceeded 300 miles to Clinton, leaving that point with 12 hours of the 36 hours period left in which to run the remaining 138 miles. The first accident occurred at Proviso, 16 miles from Union Stock Yards, when a drawbar pulled out, causing the derailing of a car. Only 3

hours and 12 minutes remained. It was necessary to call, by telegraph, a steam wrecker standing, with a full crew ready to start, 40 miles away. It started immediately upon being called, and the train proceeded after a delay of 2 hours and 52 minutes. But the wrecker was not called until 1 hour and 12 minutes after the accident occurred. And no effort was made to explain this delay.

The second accident occurred at Brighton Park, $1\frac{1}{2}$ miles from the Union Stock Yards, where another drawbar pulled out, and there was a delay of 28 minutes.

The pulling out of drawbars is a very common occurrence in the running of trains. It often occurs without any apparent cause, and the consequent delays are to be anticipated on any long run.

There was evidence introduced by the carrier that the ordinary run from Clinton to Union Stock Yards was 9 hours, and that it was sometimes made in 6 hours. But this train in making it consumed 15 hours and 5 minutes, or, excluding the delays of 3 hours and 20 minutes, 11 hours and 45 minutes. And the time consumed in running the last 16 miles was 6 hours and 17 minutes, or, excluding the 3 hours and 20 minutes of delay, 2 hours and 57 minutes, although the 36-hours' limit had already been exceeded. And no effort was made to explain why such poor time was made on this part of the trip.

Opinion of Circuit Court of Appeals. In holding that the facts just stated furnished evidence sufficient

to take the case to the jury and to support the verdict, the Circuit Court of Appeals said:

In brief for plaintiff in error it is said:

"The train was in Proviso, 136 miles distant, at 2.48 in the morning, or 8 hours and 43 minutes after leaving Clinton, having traversed that distance at an average speed of 15.7 miles per hour. At that point, but a very few miles from the stockyards, they therefore had 4 full hours left."

But the stock was not unloaded till 9.05—6 hours 17 minutes after reaching Proviso, 16 miles away. Deducting 3 hours 20 minutes for the delays at Proviso and Brighton Park leaves 2 hours 57 minutes clear running time, which was consumed to make 16 miles, with a train carrying stock which had then already been confined 36 hours or more. The purpose of the law being, as declared in the act, "to prevent cruelty to animals while in transit," humanitarian considerations would suggest that, as the maximum period of confinement is approaching or passed, reasonable diligence on the carrier's part will require corresponding increase of effort to minimize further duration of the confinement.

The jury may have concluded that, conceding the delay of 3 hours 20 minutes as claimed, the consuming of 2 hours 57 minutes for a 16-mile run with stock which had already been confined by the same carrier since 6 o'clock p. m., of the second day before, manifested such a disregard for the statute as to afford sufficient evidence of its willful violation. We cannot say that a verdict so based

would be without evidence to support it, or a judgment given on such a verdict contrary to law. And, indeed, the jury might from the evidence have concluded that yet another hour was wasted at Proviso, at which station at 2.48 a. m., the car in the train was derailed. The wrecker was at Palatine with its crew ready to go out on any such emergency. But the foreman of the crew testified that he did not get notice till 4; that he started at once, reached proviso at 5.05, cleared the track at 5.30, so that at 5.40 the train proceeded. In these days of lightning communication, the jury might not improperly have found that under the circumstances ordinary care did not admit of such delay in calling the wrecker, and that such hour or so of the delay at Proviso was neither necessary nor unavoidable. (234 Fed. 268, 271.)

The charge. The only record of any exceptions to the charge is that, following certain portions of the charge set out in the bill of exceptions, this appears:

The COURT. Any exceptions?

Mr. WHEELER. Yes, your Honor. It is this, that this suit involves the train movement from point of origin to destination.

The COURT. You except to that part of the charge?

Mr. WHEELER. I do, and to that part of the charge where your Honor says that the railroad can not run its trains as it pleases with the idea that at the last moment of slipping in within the 36 hours and then because of some accident we can not get it.

The COURT. All right.

Mr. WHEELER. To those two parts.

The COURT. Yes.

And thereupon the defendant, by its counsel, duly excepted to the giving by the court to the jury of the foregoing instructions and each and every part thereof.

And thereupon the jury returned its verdict finding the defendant guilty, which is of record herein. (R. p. 31.)

QUESTIONS INVOLVED.

The questions involved are:

- (1) Was there evidence to support the verdict?
- (2) Were such exceptions taken as preserve the right to have any part of the charge reviewed?
- (3) If so, was there reversible error in the charge?

BRIEF OF ARGUMENT.

(1)

There was excess confinement of 3 hours and 5 minutes. The claim is that there should be deducted from the actual time 3 hours and 20 minutes of unavoidable delay, leaving the carrier 15 minutes to the good.

(2)

The fact that there has been an unavoidable delay does not afford exemption if it appears that notwithstanding such delay the carrier could, by proper foresight and diligence, have unloaded within the required time.

Atchison, Topeka & Santa Fe Ry. Co. v. United States, 244 U. S. 336.
Newport News, etc., v. United States, 61 Fed. 480, 490.

(3)

The full 3 hours and 20 minutes can not be counted as excusable delay because—

1st. At least an hour was inexcusably wasted.

2d. At least 28 minutes of it consisted of loss from an accident of such common occurrence that it should have been anticipated.

(4)

On the carrier's own theory, then, it has failed to account for from three-quarters to $1\frac{1}{4}$ hours.

(5)

There was evidence warranting the conclusion that, after the accident happened, the carrier needlessly consumed from an hour to $1\frac{1}{2}$ hours in making the rest of the trip.

(6)

Under the circumstances, the confinement of the cattle for so long a time manifested that disregard of the law or indifference to its requirements which amounts to willfulness within the meaning of the statute.

This case, 234 Fed. 268, and cases cited.

Spurr v. United States, 174 U. S. 728.

Armour Packing Co. v. United States, 209 U. S. 56.

(7)

The exceptions are general and go to a portion of the charge which contains propositions of unques-

tioned correctness. They, therefore, can not be considered.

Lincoln v. Claflin, 7 Wall. 132.

Anthony v. Louisville & Nashville R. R. Co.,
132 U. S. 172.

Cooper v. Schlesinger, 111 U. S. 148, 152.

Mobile & Montgomery Ry. Co. v. Jurey,
111 U. S. 584, 596.

Beckwith v. Bean, 98 U. S. 266, 284.

McNitt v. Turner, 16 Wall. 352, 362.

Hanna v. Maas, 122 U. S. 24.

(8)

The portion of the charge excepted to is not erroneous.

ARGUMENT.

I.

VERDICT SUPPORTED BY EVIDENCE.

Very little of force can be added to what has already been quoted from the opinion of the Circuit Court of Appeals in holding that the verdict is supported by evidence.

It is conceded that the cattle were confined 3 hours and 5 minutes longer than the limit fixed by the statute. The claim is that 3 hours and 20 minutes of the time of confinement was consumed as the result of unavoidable accidents. And it is insisted that, counting out this time, the cattle were unloaded 15 minutes before the expiration of the 36 hours period.

But if we concede that this delay was unavoidable and could not have been anticipated, the defense is still not made out. Excess confinement is excused only if the unloading within the statutory period is, in fact, prevented by such an accidental cause. Manifestly if, notwithstanding a delay of this kind, the carrier could still, by due diligence and proper effort, have unloaded the cattle within 36 hours, it is not excused. Indeed, the happening of an accident which causes an unexpected delay itself imposes the duty of greater effort and diligence during the remainder of the journey than would otherwise be required by ordinary prudence. In view of such an accident, ordinary care and decent regard for the law require that every reasonable effort be exerted, first, to make the delay as brief as possible, and, second, to complete the trip in as short a time as possible. In short, an unavoidable accident can not be said to have prevented a proper unloading unless every reasonable effort has been made to minimize the consequences.

The question is, in principle, the same as that dealt with in *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 244 U. S. 336. That case involved the Hours of Service Act, which contained this proviso:

Provided, That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said em-

ployee left a terminal, and which could not have been foreseen.

Speaking of this proviso, the court (page 343) said:

It was not the intention of the proviso, as we read it, to relieve the carrier from the exercise of diligence to comply with the general provisions of the act, but only to relieve it from accidents arising from unknown causes which necessarily entailed overtime employment and service. *United States v. Dickson*, 15 Peters 141. It is still the duty of the carrier to do all reasonably within its power to limit the hours of service in accordance with the requirements of the law.

Applying this view to the present case, it was the duty of the company, after the breakdown between Barstow and San Bernardino, to use all reasonable diligence to avoid the consequences of the unavoidable accidents which had delayed the movement of the train and to relieve the crew by the means practically at hand.

Manifestly, the same rules apply to the proviso now under consideration. The carrier can not claim exemption if the excess confinement is due to its own want of foresight and diligence, nor, in every case, where the law would have been complied with but for an unexpected accident. The foresight to be expected of an ordinarily prudent man experienced in railroad operation must be used in locating unloading facilities and in running a particular train. It is common knowledge that a train, on a long trip, can not be run continuously. Stops must be made

for coal and water, to permit the passing of trains, on account of minor accidents, or unfavorable weather, and for various other causes incident to ordinary railroad operation. Experience teaches that the exact amount of delay to be expected from such causes can not be accurately foretold. Particularly is it shown that the pulling out of a drawbar is of such common occurrence, one witness saying that it is of daily occurrence, that it is to be expected on almost any long run. If, therefore, a railroad locates its unloading facilities without making allowance for the delays thus to be reasonably anticipated, and so that the law can not be complied with unless conditions are perfect and only the very minimum of delays occur, it fails to exercise proper foresight, and, if a delay such as is not uncommon causes the run to exceed 36 hours, it is not excused.

Again, if proper allowance has been made for ordinary delays, but the carrier, without legal excuse, runs a cattle train so slowly over the first part of the trip as not to leave sufficient time to allow for like delays on the remainder of the trip, it can not claim exemption if one of those accidents likely to occur on any trip happens and results in excess confinement.

Likewise, if an accident occurs which, with reasonable diligence, can be remedied in a few minutes and the carrier permits a delay of several hours, the time thus wasted can not be excluded from the 36 hours of confinement permitted. And if, after an unavoidable delay has occurred, excess confinement may reasonably be avoided by increasing the speed or reducing the time lost by stops, there is no exemption.

Moreover, if such delays occur as will excuse some excess confinement, if the carrier prolongs this beyond what is reasonably necessary, it can not escape the penalty of the law.

Manifestly, then, to determine whether proper foresight and prudence have been exercised, the entire trip must be considered.

This, we believe, is the construction very generally placed by the courts on the statute ever since years ago it was stated by Judge Lurton in *Newport News, etc., Co. v. United States*, 61 Fed. 488, 490, in this language:

Congress did not mean that simply because the carrier had encountered a storm, therefore he should be excused. It must appear that the storm "prevented" obedience. The storm could not be prevented. Its consequences may be avoided or mitigated by the exercise of diligence. If, with all reasonable exertion, a carrier is unable, by reason of a storm, to comply with the law, then he has been unavoidably "prevented" from obeying the law. If, notwithstanding the storm, he could by due care have complied with the law, then he is at fault, because "his own negligence is the last link in the chain of cause and effect, and in law the proximate cause" of the failure to comply with the law. Therefore, to avail himself of the excuse of "storm," the carrier must show, not only the fact of a storm, but that with due care he was "prevented," as an unavoidable result of the storm, from complying with the law.

In the present case, it is insisted by the carrier that—

The issue in this case was not whether the carrier was negligent in its train schedules or in its care for the shipment other than in respect to the accidents referred to. (Brief, p. 19.)

In other words, the contention is that if an unavoidable delay equal to the time of excess confinement is shown, there is no liability regardless of anything else that may appear. But even if this was the true rule, the verdict would still rest upon ample evidence. The utmost that is claimed is that two accidents caused a delay of 3 hours and 20 minutes, and that, excluding all of this time, the cattle were unloaded 15 minutes to the good. But it must be conceded that even where a train is stopped by an unavoidable accident, the carrier must use reasonable diligence to get it started without unnecessary delay. It can not neglect the means at hand to overcome the consequences of the accident. It can claim exemption for only so much time as is reasonably necessary for the effective use of these means. Surely there can be no serious insistence that it can claim credit for time deliberately wasted.

In this case when the accident happened the carrier had 16 miles to run and 3 hours and 12 minutes left. The cattle had then been confined nearly 33 hours. It was at once apparent that a wrecker would have to run 42 miles, requiring about an hour, and that at least another half hour would be required to start the train. The telegraph was at

hand, and the wrecker was ready. Prompt action would have started the train with about an hour and a half to run 16 miles. It had run 422 miles in a fraction less than 33 hours, or at the rate of a little less than 13 miles per hour. If no time was wasted in getting started, the same rate of speed would have taken it in within the 36 hours. But, with knowledge of all these things, the carrier sat by and did nothing for an hour and 12 minutes, when it finally used the telegraph, which should have been used at once, and ordered out the wrecker. No excuse is offered for this delay, and it can not be regarded as anything but a deliberate wasting of at least an hour of time. This reduces the time claimed as an unavoidable delay to 2 hours and 20 minutes, and if that be excluded there would still be 45 minutes of excess confinement.

But, even allowing credit for the full 2 hours and 52 minutes lost as a result of the first accident, there was still evidence from which the jury could find that there was excess confinement. In order to come within the 36 hours the carrier adds to this 2 hours and 52 minutes the 28 minutes lost as a result of the second accident, which was an ordinary pulling out of a drawbar. But we have seen that the occasional pulling out of a drawbar is one of the things which a carrier must always anticipate. We may assume that the resulting derailment of a car or the pulling out of an unusual number of drawbars is not to be anticipated. But if we deduct from the actual running time the delay incident to

the first accident, nothing else which should not have been anticipated occurred. And, allowing the full time claimed for the first accident, but disallowing that claimed for the second as being only one of the common occurrences in the operation of trains, there would still be an excess confinement of 13 minutes.

In still another view there was evidence to support the verdict. When the train left Proviso all of the 36 hours had been consumed except 20 minutes. There was, therefore, excess confinement during practically the whole of the remaining 16 miles. If this excess time was excusable at all, it was so only to the extent of the time reasonably necessary to make the run. Even excluding the full 3 hours and 20 minutes claimed, the carrier consumed 2 hours and 57 minutes in running 16 miles, making only a fraction over 5 miles an hour. To determine whether this much time was reasonably necessary the jury was warranted in looking at the whole trip. It thus appeared that the first 300 miles of the trip were made in 24 hours, or at the rate of $12\frac{1}{2}$ miles per hour. The next 122 miles were made in 8 hours and 48 minutes, or at the rate of 13.8 miles per hour. The carrier made no effort to show that there were any conditions which would require a lower rate of speed for the remaining 16 miles. The only other evidence throwing any light on what time would be reasonably necessary was that offered by the carrier to the effect that the ordinary run from Clinton to Union Stock Yards was 9 hours, making

the rate $15 \frac{3}{9}$ miles per hour, and that it had been made in 6 hours, or at the rate of 23 miles per hour. This was a through cattle train, and had no local work to do. These facts furnish ample evidence for the inference that 5 miles per hour was an unreasonably slow rate to run a train carrying cattle already excessively confined, and that, with due diligence, the train should have been run at least 12 miles per hour, after excluding the delays claimed. This would have required $1 \frac{1}{3}$ hours for the trip instead of practically 3 hours. There was, therefore, something like $1 \frac{1}{2}$ hours of unnecessary excess confinement.

There was, therefore, evidence to justify the finding that (1) a material part of the excess time was wasted at Proviso and (2) proper diligence in running from Proviso would have saved a very considerable part of the time actually consumed in making the run.

It is said, however, that the facts do not make a case of "willful" failure to comply with the law. On this point the Circuit Court of Appeals, citing cases decided by numerous other Circuit Courts of Appeals, said:

That the term "willfully," as employed in the act, does not imply deliberate intent to do injury to the stock or to its owner has been too frequently considered and definitely determined to require further demonstration. The jury may conclude that the violation was willful, if from the evidence they find that the carrier in confining the stock beyond the statutory limit manifested disregard of the law,

or indifference toward its requirements. (234 Fed. 268, 269.)

This is in accord with the principle announced by this court in construing the word "wilful" in the National Banking Laws, thus:

If an officer certifies a cheque with the intent that the drawer shall obtain so much money out of the bank when he has none there, such officer not only certifies unlawfully, but the specific intent to violate the statute may be imputed. And so evil design may be presumed if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not, or is grossly indifferent to his duty in respect to the ascertainment of that fact. (*Spurr v. United States*, 174 U. S. 728, 735.)

See also *Armour Packing Co. v. United States*, 209 U. S. 56.

II.

EXCEPTIONS TO THE CHARGE.

It is at least doubtful whether the exceptions to the charge raise any question which an appellate court can be called on to review.

The bill of exceptions sets out the portion of the charge excepted to, covering nearly two printed pages. This is followed by what purports to be a stenographic report of a colloquy between court and counsel. This apparently indicates a purpose to except to the portion of the charge which (1) permits "the train movement from point of origin to destination" to be considered, and (2) "says that

the railroad can not run its trains as it pleases with the idea that at the last moment of slipping in within the 36 hours and then because of some accident we can not get it." But counsel himself seems not to have considered what was stated in this colloquy to have been a full or accurate statement of his exception, for he immediately formulated it thus:

And thereupon the defendant, by its counsel, duly excepted to the giving by the court to the jury of the foregoing instructions and each and every part thereof. (R. 31.)

The scope of the exception must, therefore, be determined from the language just quoted. Plainly it is an exception to every part of the "foregoing" instructions as set out in the bill of exceptions. It follows that if any proposition contained in these instructions was correct, the exception was wholly unavailing. *Lincoln v. Claflin*, 7 Wall. 132, 139; *Anthony v. Louisville & Nashville R. R. Co.*, 132 U. S. 172; *Cooper v. Schlesinger*, 111 U. S. 148, 152; *Mobile & Montgomery Ry. Co. v. Jurey*, 111 U. S. 584, 596; *Beckwith v. Bean*, 98 U. S. 266, 284; *McNitt v. Turner*, 16 Wall. 352, 362; *Hanna v. Maas*, 122 U. S. 24.

Looking at the instructions, we find that they contain (R. p. 30) a definition of "due diligence," which counsel do not and can not question, and (R. p. 31) a statement in effect that such delay as the jury may find resulted from the two accidents described in the evidence was excusable. The instructions called in question, therefore, contained at least two correct propositions.

III.

NO ERROR IN THE CHARGE.

But if the exceptions can be treated as raising only the points indicated by the colloquy, the charge was not erroneous. These exceptions were disposed of by the Circuit Court of Appeals thus:

In considering the question of whether all or any of the overtime of confinement was made necessary by the proved delays, and whether in the exercise of due diligence the carrier could have brought the stock to the unloading point in materially less than the time here in question, it was entirely proper for the jury to consider the confinement and transportation of this stock from inception to unloading, and this only is what the court's charge, which is complained of, told the jury it might do. (234 Fed. 268, 271.)

It may be that, in looking at the entire trip, there is no evidence of a want of foresight and care up to the time the train reached Clinton or Proviso. But, as we have seen, the details of that part of the trip furnished material evidence on the question of the reasonableness of the time consumed in running the last 16 miles. Hence, the charge not only announced sound principles of law, but was strictly pertinent to the evidence.

IV.

In conclusion, the carrier was under the double duty to exercise such *foresight* in laying out and making its runs that, taking into consideration ordinary delays, it could reasonably expect to comply with the law and, after the occurrence of an unexpected delay,

to use *diligence* to minimize the consequences of such delay. We have seen that, after the accident at Proviso, this carrier deliberately wasted at least an hour. This itself is sufficient to warrant the verdict. In addition, we have seen that the fair inference from such evidence as the carrier submitted was that 2 hours and 57 minutes actual running or, including 28 minutes resulting from such an accident as is always to be anticipated, 3 hours and 25 minutes, was an unreasonable time to be consumed in running 16 miles and showed a gross want of diligence. But if this inference was not warranted, and even if it appeared that there were conditions on account of which this much time was ordinarily required, the plight of the carrier would be no better. It would still be guilty of wasting an hour at Proviso. And it would be in the position of having exercised such poor foresight in running its train to Proviso as to leave only 3 hours and 12 minutes for a run which would, without even an ordinary accident, require 2 hours and 57 minutes, and which in the event of a drawbar pulling out, a thing always to be anticipated and which did occur, would require 3 hours and 25 minutes and result in a failure to comply with the statute. It would thus stand convicted of a want of both foresight and diligence.

It is respectfully submitted that there is no error in the judgment and that it should be affirmed.

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